No. 79-1587.

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

A/S IVARANS REDERI,
PETITIONER,

v.

ROGER JOHNSON,
RESPONDENT.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

NATHAN GREENBERG,
424 Lewis Wharf,
Boston, Massachusetts 02110.
(617) 227-8390

Of Counsel:
RICHARD F. MCCARTHY,
WILLCOX, PIROZZOLO AND MCCARTHY,
50 Federal Street,
Boston, Massachusetts 02110.
(617) 482-5470

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Table of Contents.

Introduction	1
Statement of the case	2
Argument	4
1. Reasons why the writ should be denied	4
2. The primary question before the First Circuit Court of Appeals was the applicability of §§ 343 and 343A of the Restatement of Torts, Second, in determining the standard of care in an action arising under § 905 (b) of the Longshoremen's and Harbor Workers' Compensation Act	4
3. The question of whether the vessel's duty of care owed to a longshoreman is a delegable duty was never before the court below	7
Conclusion	8

Table of Authorities Cited.

Cases.

A/S Ivarans Rederi v. Roger Johnson, 613 F.2d 334 (1st Cir. 1980)	1
Lopez v. A/S, D/S, Svendborg, 581 F.2d 319 (2d Cir. 1978)	5n, 7

Constitutional and Statutory Provisions.

33 U.S.C., Longshoremen's and Harbor Workers' Compensation Act § 905 (b)	4, 5

MISCELLANEOUS.

Restatement of Torts, Second
§ 343 4, 5, 6, 7, 8
§ 343A 4, 5, 6, 7, 8

In the
Supreme Court of the United States.

October Term, 1979.

No. 79-1587.

A/S IVARANS REDERI,
Petitioner,

v.

ROGER JOHNSON,
Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Introduction.

Respondent Roger Johnson respectfully requests this Court to deny the petition for a writ of certiorari seeking to review the opinion of the First Circuit Court of Appeals in this case. The First Circuit's opinion is reported at 613 F. 2d 334 (1980), and is attached to, and made a part of, the petition as Appendix, A-1 through A-34.

Statement of the Case.

Respondent Johnson sustained crippling injuries when he fell 30 feet into the open No. 3 'tween deck hatch of the M/V "Salvador." He was an employee of New Bedford Stevedoring Corporation (Stevedore).

Employees of the stevedore boarded the ship at 8:00 A.M., preparatory to loading cargo in the deep tanks of No. 2 hatch and No. 4 hatch.

The deep tanks were the lowest level in No. 2 hatch. No. 2 and No. 4 hatches were open from the main deck level, but No. 3 hatch was closed. Two 17-foot openings in the after bulkhead of No. 2 'tween deck allowed access to No. 3 'tween deck.

At the 'tween deck level, two of the covers over No. 3 lower hold were folded back, leaving an unguarded, un-roped opening over a 30-foot drop. Nothing in any way blocked off the openings between No. 2 'tween deck and No. 3 'tween deck. A ladder from the 'tween deck level ran to the main deck from the after edge of the hatch opening in No. 3 'tween deck.

Before work started, Duarte, the signalman, an employee of the stevedore, observed the open covers in No. 3 'tween deck and the unblocked openings between No. 2 and No. 3 'tween decks. The longshoremen have nothing to do with closing hatch covers; the crew of the vessel should have closed off the openings.

At 8:05 A.M., Duarte ascended to the main deck, where he asked the mate to close the open covers at No. 3 'tween deck level or to rope off, board-over or seal in the openings leading from No. 2 'tween deck to No. 3 'tween deck. The mate said he would take care of it right away. A ship's officer is concerned at all times with safety in the handling and storage of cargo.

Work commenced in No. 2 deep tanks at approximately 8:05 A.M. The cargo was lowered into them on pallets, each loaded pallet weighing approximately one ton.

A ladder ran from No. 2 'tween deck to the main deck. While a loaded pallet was coming into No. 2 hatch or an empty pallet going out, the ladder was not safe to use.

At approximately 8:30 A.M., respondent Johnson, needing to replace his safety helmet, obtained his foreman's permission to leave the deep tank and come up to the 'tween deck. The signalman, standing in the No. 2 'tween deck area, told him to watch out and get out of the way because another pallet was coming down through the hatch opening at the main deck level, and it was not safe.

Rather than going up where the load is coming over, longshoremen use empty hatches to go ashore.

Because he thought it would be safer to go out through No. 3 hatch, than to try to go out through No. 2 hatch while a pallet was coming in, respondent walked through the offshore unblocked opening in the 'tween deck bulkhead and into No. 3 'tween deck. He intended to use the ladder which, in the light coming from No. 2 'tween deck and No. 4 'tween deck, he could see at the other end of No. 3 'tween deck. He could see light from No. 4 hatch coming through the ladder. Respondent looked straight ahead at the ladder, took five to seven steps toward it, and fell from No. 3 'tween deck into No. 3 lower hold. After the respondent's accident, the ship's crew roped off the passageway between No. 2 and No. 3 'tween decks and also closed the openings in No. 3 'tween deck through which respondent had fallen.

Argument.

1. Reasons Why the Writ Should be Denied.

The thrust of the petitioner's argument is that the First Circuit committed error insofar as it held that the duty owed a longshoreman by a vessel is a non-delegable duty which lawfully cannot be delegated by the vessel to the independent stevedoring contractor. Petitioner goes on to assert that there is a conflict among the Circuit Courts of Appeals on this question. However, petitioner misapprehends the First Circuit's opinion. The First Circuit never held that the vessel's duty to a longshoreman is "non-delegable." More importantly, whether or not the First Circuit was correct in its ruling would not affect the outcome of this case because, as will be shown below, the jury was charged according to what the First Circuit held to be an erroneous standard of care which was more favorable to the vessel owner than to the plaintiff. Nevertheless, the jury returned a verdict for the plaintiff, respondent herein, and, therefore, even if the First Circuit decision was reversed the judgment in favor of plaintiff would stand.

2. The Primary Question before the First Circuit Court of Appeals was the Applicability of §§ 343 and 343A of the Restatement of Torts, Second, in Determining the Standard of Care in an Action Arising Under § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act.

With respect to the question presented, the Court of Appeals did not hold that the vessel owner's duty of care owed to a longshoreman was "non-delegable" under § 905(b) of the

Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b). The only issue before the Court of Appeals was whether §§ 343 and 343A of the Restatement of Torts, Second (the "Restatement") should be the basis for the standard of care in a longshoreman's action against the vessel for personal injuries. The issue arose because the district court charged the jury that §§ 343 and 343A did provide the basis for liability in a longshoreman's action. The Court of Appeals found it necessary to articulate the proper standard of care applicable in the First Circuit in a longshoreman's action and to ultimately find that the district court's reliance on the Restatement was error even though the jury returned a verdict in favor of the injured longshoreman and the district court's error was harmless.

Judge Bownes, writing for the court, conducted a scholarly and thorough review of the legislative history of § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act and the applicable case law. In his review Judge Bownes noted that there was a conflict among the circuits as to the applicability of §§ 343 and 343A of the Restatement. Further, Judge Bownes observed that a majority of the circuits, notably the Second,[1] Fourth, Fifth and Seventh, have held that §§ 343 and 343A of the Restatement do form the basis of the vessel's liability to an injured longshoreman. However, Judge Bownes held that the First Circuit rejected a blanket adoption of §§ 343 and 343A insofar as those sections incorporated the defenses of assumption of the risk or contributory negligence both of which are antithetical to § 905(b). The Court of Appeals held that the standard of care to which the vessel owner is to be held is "the standard of reasonable care under the circum-

---

[1] But see, *Lopez* v. *A/S, D/S, Svendborg*, 581 F.2d 319 (2d Cir. 1978) which appears to be at odds with this rule.

stances which permits a finding of negligence upon the showing of:

(1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that lead to the injury;
(2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and
(3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger. (Petition, A-26.)

The adoption of this standard by the First Circuit puts that Court in a minority of jurisdictions (along with the Third and Ninth Circuits) with respect to the applicability of §§ 343 and 343A.

As noted earlier, the First Circuit's analysis of the applicability of §§ 343 and 343A of the Restatement was not central to the holding of the case. The Circuit Court held that since the trial court's charge to the jury was based upon §§ 343 and 343A the charge was erroneous. (Petition, A-30.) But the court found that §§ 343 and 343A are more favorable to the vessel owner than is the standard of care articulated by the court. Therefore, the district court's error in relying on §§ 343 and 343A was harmless, since the jury relying on a charge which was more favorable to the vessel owner, still returned a verdict in favor of the plaintiff. Even under the more stringent standard of §§ 343 and 343A, on the facts of this case, the respondent was entitled to judgment in his favor.

If this Court were to grant certiorari and, thereafter reverse the holding of the First Circuit Court of Appeals by ruling that the applicable standard of care to be imposed on the vessel for

injury resulting to a longshoreman is that contained in §§ 343 and 343A, the jury verdict would still stand since the jury was charged according to that standard. (Petition, A-4). There is no reason for this Court to grant the petition for a writ of certiorari. Whatever conflict may exist among the circuits does not affect the outcome of this case.

3. THE QUESTION OF WHETHER THE VESSEL'S DUTY OF CARE OWED TO A LONGSHOREMAN IS A DELEGABLE DUTY WAS NEVER BEFORE THE COURT BELOW.

Contrary to petitioner's assertion there is no conflict among the circuits on the question of whether the vessel owner's duty is delegable *vel non*. In an argument that is almost ingenuous the petitioner would have this Court believe that the conflict among the circuit courts of appeal on the issue of whether §§ 343 and 343A of the Restatement forms the basis of the vessel owner's liability to a longshoreman is really a conflict over whether the vessel owner's duty of care is delegable to the stevedore. This simply is not a viable issue and it was not before the First Circuit. The vessel cannot avoid liability on the facts of this case by arguing that it assumed that the stevedore would have corrected the known hazard which the vessel created. It is settled law, even under §§ 343 and 343A of the Restatement, that it is negligence for the vessel to leave hatch covers opened and unguarded in an unlighted hatch area adjacent to a work area because it is foreseeable that longshoremen will utilize that area during their work. No circuit has held that a vessel owner may escape liability where the stevedore's negligence may be concurrent with that of the vessel's. In *Lopez* v. *A/S, D/S, Svendborg*, 581 F.2d 319, 324 (2nd Cir. 1978), the court stated:

"The fact that the stevedore shared in the decision to continue working did not exonerate the shipowner, and there is no reason, as a matter of fundamental tort law, why it should not be held liable in damages for its own negligence. It is well established tort law that 'an actor whose negligence has set a dangerous force in motion is not saved from liability for harm it has caused to innocent persons solely because another has negligently failed to take action that would have avoided this.' . . . Thus, even if the stevedore was negligent in failing to eliminate the dangerous condition, that would not be a defense for the shipowner."

Conclusion.

The District Court instructed the jury according to the standard of care predicated on § 343 and 343A of the Restatement. (Petition, A-4). The Circuit Court held the charge was erroneous to this extent but the error was harmless as §§ 343 and 343A are more favorable to the vessel owner than the standard of care decided as applicable by the First Circuit. This Court should deny this petition because even if the Court should accept this petition and reverse the First Circuit's decision as to the controlling standard of care, the judgment for Johnson

would not be disturbed as the District Court did charge the jury according to the standard of care of the Restatement. (Petition, A-30).

Respectfully submitted,

NATHAN GREENBERG,
424 Lewis Wharf,
Boston, Massachusetts 02110.
(617 227-8390

Of Counsel:
RICHARD F. McCARTHY,
WILLCOX, PIROZZOLO AND McCARTHY,
50 Federal Street,
Boston, Massachusetts 02110.
(617) 482-5470